Imposing Costs on Newspaper in Successful Source-Protection Case Did Not Violate Article 10

Ronan Ó Fathaigh

In the summer of 2009, the Irish supreme court issued a landmark opinion, overturning an order issued against a newspaper to answer questions about a leaked document it had received from an anonymous source. However, four months later, the same supreme court ruled that the newspaper was required to pay the legal costs of the government-created body that had sought the order, because the newspaper had destroyed its copy of the leaked document before the legal action had commenced. In a surprising majority opinion, the Fifth Section of the European Court has now ruled in *Keena v Ireland*, that the imposition of costs on the newspaper, even though its action was successful, was not a violation of Article 10.

The applicants in the case were Colm Keena, a journalist with *The Irish Times*, and Geraldine Kennedy, the newspaper's then-editor-in-chief. In 2006, Keena wrote a front-page article detailing how a government-established tribunal investigating political corruption had written to a businessman, seeking information on possible payments made to the Irish prime minister. The article was based on a leaked tribunal letter the journalist had received anonymously.

Hours after the article had been published, the tribunal wrote to the newspaper's editor, who confirmed to the tribunal that the article was based on a tribunal letter the newspaper had received anonymously. Three days later, the tribunal issued an order requiring the newspaper to hand over the tribunal's correspondence. However, the newspaper's editor informed the tribunal that the letter "had been destroyed," and disputed the tribunal's power to make such an order. The journalists appeared before the tribunal, but refused to answer any questions "which they considered might lead to the identification of the source of the leak of confidential information." The tribunal then issued a ruling, holding that the applicants were in breach of a tribunal order, and applied to the high court "to compel the applicants to comply with its orders."

The high court ruled that the tribunal had the legislative power to compel the journalists to answer questions put to them about the leaked document. The court held that the journalistic privilege against disclosure of sources was "overwhelmingly outweighed" by the need to "preserve public confidence in the Tribunal." Moreover, "only the slightest weight" should be attached to journalistic privilege when it involved "anonymous communication." And crucially, the high court stated that the "destruction of these documents" was a relevant consideration to which "great weight" must be given.

The applicants appealed to the supreme court, which delivered a unanimous opinion in July 2009, overturning the high court judgment. The supreme court agreed with the high court's assessment that the journalists had engaged in "reprehensible conduct" in destroying the documents, but held that the high court had erred in attaching "great weight" to this consideration. Moreover, given that the source was anonymous, and the documents "no longer exist," the supreme court considered that the benefit to the tribunal in asking the journalists about the source was "speculative at best." Thus, the tribunal's order failed the test under *Goodwin v UK* that journalists can only be compelled to answer questions about their sources if justified by an "overriding requirement in the public interest."

However, four months later, the supreme court issued a one-page ruling on costs, and held that the journalists were to pay the tribunal's legal costs, currently totally 393,000 euro (not including the newspaper's own costs). The court held that although the winning party will usually have their costs paid, this principle may be departed from in "exceptional cases." The "reprehensible conduct" of the journalists in destroying the documents "determined" the outcome of the case, and "was such as to deprive them of their normal expectation" of a costs award in their favour. The tribunal was "fully entitled" to seek the assistance of the high court, and consequently, the journalists were to pay for the tribunal's costs.

The journalists then made an application to the European Court, arguing that the costs ruling violated Article 10. First, the applicants argued that the tribunal's attempt to discover the source was "inherently misconceived" and was a "direct threat" to the right to protection of journalistic sources, which "justified their actions" in destroying the document. However, the Court rejected this argument, holding that the tribunal's interest in discovering the source was not "necessarily devoid of merit." The issue of balancing the competing interests was for the domestic courts, and the courts would have been able to do so "had the applicants not destroyed the documents." It followed, according to the Court, that destroying the documents was not a "legitimate exercise" of their Article 10 right to protect their sources.

The applicants also argued that even though they had destroyed the leaked document, the Irish courts "were still able to rule on the case." However, the European Court said that this was "to misconstrue the Supreme Court's decision," as the applicants had "presented to the Tribunal" and the courts a "*fait accompli*," and "undermined the judiciary." The Court agreed with the Irish supreme court that the destruction of the documents had "deprived the courts of any power to give effect to any order of the Tribunal."

And finally, the Court rejected the argument that the costs order would have a chilling effect on press freedom because (a) as a "general principle" costs are a matter for the "discretion" of domestic courts; and (b) the costs order would have "no impact" on "public interest journalists" who respect the rule of law, or compel disclosure of sources. For the European Court, the ruling "simply signified" that nobody may "usurp the judicial function." It followed, according to the Court, that there was "no interference" with freedom of expression, and held the application "manifestly ill-founded," and therefore inadmissible.

Comment

As with all admissibility decisions, while we know the Fifth Section's ruling was "by a majority," the individual votes are not disclosed, and none of the dissenting opinions are published. It is therefore important to explore whether there are any weaknesses in the majority's reasoning. First, the majority dismissed the argument that the tribunal's order was "entirely misconceived," and ruled that it was not "devoid of merit." But it is arguable that under the Court's own case law, the tribunal's subpoena attempt was entirely misconceived. The only interest the tribunal had in seeking the subpoena was to "preserve public confidence in the Tribunal." However, the European Court has consistently ruled that preserving public confidence in public bodies does not outweigh the right to protection of journalistic sources. For example, the majority nowhere applies the unanimous *Voskuil v the Netherlands* opinion, which explicitly held that the government's interest in protecting the "integrity of the police and judiciary" was not "sufficient" to outweigh the right to protection of sources.

And indeed, the majority nowhere mentions the stronger interests the Court has rejected in the past as not outweighing the right to protection of sources, such as: (a) an intelligence service's interest in removing a leaked document from public circulation (*Telegraaf v the Netherlands*), (b) a government's interest in "the prevention of disorder or crime" by prosecuting public officials who had leaked documents to the press (*Roemen v Luxembourg*), or (c) a government's interest in the "prevention of disorder or crime" by prosecuting public officials for possible bribery following leaks to the press (*Tillack v Belgium*). It is thus arguable that the applicants were entirely correct to argue that the tribunal's subpoena attempt was bound to fail under the near-absolute Article 10 right to protection of sources, especially where the only interest was "preserving public confidence in the Tribunal."

Second, and central to the majority's reasoning, was that "had the applicants not destroyed the documents," the courts would have been able to "balance the competing interests." But this contention is highly questionable when we consider the alternative: had the applicants not destroyed the documents, the Irish courts would still not have had possession of the documents, as the journalists were never going to surrender the documents to the courts. Short of police raids on newspaper offices, or a journalist's home, in every other source-protection case the European Court has considered in nearly 20 years, the domestic courts never have possession of the leaked documents in question.

Take for example another case not applied by the majority, *Financial Times v UK*, a case directly on point for *Keena*, where four newspapers refused to surrender an anonymously leaked document, in defiance of a UK court of appeal order. The European Court found that the press was perfectly entitled to refuse to obey such an order, and nowhere did the Court accept the proposition that because the domestic courts did not have possession of the leaked documents, they could not "balance the competing interests." Indeed, the Court in *Financial Times* ordered the government to reimburse the press's legal costs, to the tune of 160,000 euro, despite their refusal to hand over the documents.

And finally, a major question hangs over the majority's rejection of the chilling effect argument because (a) as a "general principle" costs are a matter "for the discretion" of domestic courts; and (b) the costs order would have "no impact" on other journalists. On point (a) the majority cite only one authority: *Christodoulou v Cyprus*. It is arguable that *Christodoulou* is inapplicable, as it involved the Article 6 right to a fair trial, and whether a costs order following a successful challenge to a rent decision was "fair." But more importantly, *Christodoulou* is not controlling, when we consider two Article 10 cases the majority fails to apply, and actually concern the press and costs orders: in *MGN v UK* the Court applied its highest level of scrutiny, the "most careful scrutiny" test, when deciding whether a costs order against a newspaper violated Article 10, and totally rejected any sort of *Christodoulou*-type deference to domestic courts. Similarly, in *Kasabova v Bulgaria*, the Court applied its "most careful scrutiny" test to a costs order imposed on the press, even where the press had lost its case.

And point (b) is also highly questionable, if we accept that the supreme court basically punished a newspaper through a financial sanction for refusing to surrender a document. It is difficult to see any principled difference between a newspaper shredding a document to protect a source where the government's interest is objectively weak, and a newspaper refusing to surrender a similar document in defiance of a court order. If a financial sanction, in the form of a costs order, can be applied in the first scenario, journalists may have a reasonable fear that it can be applied in the second instance. We should remember that the

dissenting view in *Goodwin* was that refusing to obey a court order to protect a source was to "submit the judicial process" to the "subjective assessment" of journalists, "frustrated" national courts, and violated rules of "natural justice." The *Keena* opinion has language disturbingly similar to the *Goodwin* dissent, written, ironically enough, by an Irish judge, Brian Walsh. Not one of Judge Walsh's 17 colleagues joined his dissenting opinion in 1996, and it is hoped the *Keena* opinion will be treated with similar scepticism in the future.